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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

14 IN RE CALIFORNIA BAIL BOND
ANTITRUST LITIGATION

Master Case No. 4:19-CV-00717-JST

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION TO LIFT STAY OF DISCOVERY**

16 THIS DOCUMENT RELATES TO:

17 All Actions
18
19

1 **I. INTRODUCTION**

2 Defendants’ motions to dismiss are due in nine days, yet they still have not provided
3 Plaintiffs or the Court with the slightest inkling of the merits of their forthcoming arguments.
4 They do not identify an issue they will raise that is either case-dispositive, or dispositive as to an
5 issue for which discovery is sought. The closest Defendants come is to assert that the additional
6 allegations in the Second Consolidated Amended Complaint (“SCAC”) somehow make the
7 alleged conspiracy *less* plausible. Opp’n, ECF No. 106 at 3. But Defendants must provide the
8 Court with at least a “‘preliminary peek’ at the merits of the pending dispositive motion” that
9 Defendants concede is necessary before a stay of discovery is justified. *Id.* (quoting *Huang v.*
10 *Futurewei Techs., Inc.*, No. 18-cv-00534-BLF, 2018 WL 1993503, at *2 (N.D. Cal. Apr. 27,
11 2018)). It is Defendants’ burden, and they have failed to satisfy it.

12 Instead, Defendants say they will unveil their secret arguments on June 12. But keeping
13 the discovery stay in place until then, or until Plaintiffs’ opposition is due on July 13, or until
14 Defendants’ replies are due on August 3, or until the Court rules on those motions, would set a
15 dangerous precedent that a defendant can force the gears of civil litigation to a halt with nothing
16 more than a mere promise that it will, later, identify a dispositive issue. The result would be an
17 automatic stay of discovery in every case until the pleadings are settled. But as this Court
18 acknowledged: “The Federal Rules of Civil Procedure do not provide for automatic or blanket
19 stays of discovery when a potentially dispositive motion is pending.” Stay Order, ECF No. 64 at
20 2 (quoting *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 600 (D. Nev. 2011)).

21 The stay should be lifted and discovery should proceed. If Defendants later present “well-
22 stated” dispositive arguments that “deserve careful consideration,” ECF No. 64 at 3, Defendants
23 may *then* ask to stay discovery. In the meantime, Plaintiffs would like to get to work.

24 **II. ARGUMENT**

25 **A. Defendants’ Own Cases Demonstrate Why The Stay Should Be Lifted**

26 Defendants’ authorities are inapposite because, unlike here, stays were imposed when
27 there was no order issued recognizing that plaintiffs would be able to proceed on at least some
28 claims against at least some defendants. *See, e.g., In re Wyse Tech. Sec. Litig.*, 744 F. Supp. 207,

1 210 (N.D. Cal. 1990) (maintaining stay upon dismissal of two claims because plaintiffs had not
2 pleaded fraud with sufficient particularity as to *any* defendant; dismissing third claim with
3 prejudice); *Song Fi, Inc. v. Google, Inc.*, No. C 14-5080 CW, 2016 WL 9185325, at *1 (N.D. Cal.
4 Apr. 27, 2016) (staying discovery until plaintiffs filed “a complaint that can at least *partially*
5 withstand a motion to dismiss” (quoting *Hall v. Apollo Grp., Inc.*, No.: 14-CV-01404-LHK,
6 2014 WL 4354420, at *7 (N.D. Cal. Sept. 2, 2014)(emphasis added))). Defendants ignore the
7 fact that the Court has held: (1) both components of the alleged conspiracy are plausible; (2)
8 Defendants are not immune from liability for either component; and (3) Plaintiffs adequately pled
9 the role of three Defendants in that conspiracy. MTD Order, ECF No. 91 at 8-33. Nothing in the
10 SCAC undermines those conclusions. The only remaining pleading issue is whether the SCAC
11 alleges sufficient facts regarding the remaining Defendants’ role in the alleged conspiracy.

12 Plaintiffs are confident the Court will find that the SCAC sufficiently explains the role of
13 the remaining Defendants. But even assuming for the sake of argument that the Court disagrees,
14 that result would not warrant continuing the stay. Any dismissed Defendants would continue as
15 important third parties with highly relevant information. *See, e.g., Hachette Distribution, Inc. v.*
16 *Hudson Cty. News Co.*, 136 F.R.D. 356, 359 (E.D.N.Y. 1991). Defendants say Plaintiffs’
17 authorities are inapposite because they denied stays while the defendant appealed on qualified
18 immunity grounds, but Defendants do not say why that is a distinction that makes a difference. If
19 anything, the government-official-defendant context is one in which arguments for stays pending
20 dispositive motions are *more* justifiable than in antitrust. *See, e.g., Digital Ally, Inc. v. Taser Int’l,*
21 *Inc.*, No. 16-CV-2032-CM-TJJ, 2016 WL 5944497, at *4 (D. Kan. Oct. 13, 2016) (denying stay
22 pending adjudication of motion to dismiss and finding “no basis to extend the rationale for
23 staying discovery in the governmental-official-defendant cases to the specific antitrust immunities
24 asserted by Defendant in this case”). With respect to *Skellerup Indus. Ltd. v. City of Los Angeles*,
25 163 F.R.D. 598 (C.D. Cal. 1995)—the case outside the qualified-immunity context cited by
26 Plaintiffs—Defendants argue this case has more defendants and that the city defendant in
27 *Skellerup* was already participating in discovery, *see id.* at 601, whereas Defendants here have
28 refused even to meet pursuant to this District’s ESI Discovery Guidelines. Defendants should not

1 be rewarded for stonewalling. *See* ESI Discovery Guideline 2.01 (“At the outset of a case, *or*
2 *sooner if feasible*, counsel for the parties should discuss Preservation.” (Emphasis added.)).

3 **B. Discovery’s Cost and Breadth Are Insufficient to Support a Stay**

4 Defendants contend the stay should continue because discovery requires resources, and
5 because Plaintiffs’ discovery requests reflect the breadth of Defendants’ alleged misconduct.
6 Opp’n, ECF No. 106 at 7-9. But “the costs and burdens of antitrust discovery do not erect an
7 automatic barrier to discovery in every case in which an antitrust defendant challenges the
8 sufficiency of a complaint.” Stay Order, ECF No. 64 at 2 (quoting *In re Lithium Ion Batteries*
9 *Antitrust Litig.*, No. 13-MD-02420 YGR, 2013 WL 2237887, at *2 (N.D. Cal. May 21, 2013)).
10 Following the Court’s MTD Order, the SCAC, and Defendants’ inability to articulate a single
11 dispositive dismissal argument, Defendants should, at the very least, participate in laying the
12 groundwork for discovery to take place. *See* ECF 95 at 9. If Defendants have objections to the
13 document requests Plaintiffs served on *February 20, 2019*, Plaintiffs would like to meet and
14 confer with Defendants regarding them.

15 **C. Continuing to Delay Discovery Would Further Prejudice Plaintiffs**

16 Defendants assert there would be no prejudice to Plaintiffs if the stay continues. Opp’n,
17 ECF No. 106 at 7. Defendants are wrong. First, Plaintiffs have yet to receive any information
18 regarding Defendants’ preservation efforts beyond Defendants’ conclusory assurance that they
19 have taken “reasonable steps.” But this District’s ESI Discovery Guideline 2.01 provides detailed
20 instructions, including that the parties “should strive to define a scope of preservation,” disclose
21 the scope of their preservation efforts, and “promptly” raise any dispute concerning the scope of
22 preservation with the Court. Defendants complain that Plaintiffs have not provided the Court
23 with specific examples of spoiled evidence. Opp’n, ECF 106 at 6. But it is impossible for
24 Plaintiffs to know whether evidence has been spoiled without disclosures and discovery. That is
25 the point of the ESI Discovery Guidelines and Federal Rule of Civil Procedure 26(f).

26 Second, witness memories in this case have been fading for well over a year, and will
27 continue to do so. This is an important form of prejudice. *See Pagtalunan v. Galaza*, 291 F.3d
28 639, 643 (9th Cir. 2002); *Edward/Ellis v. New United Motors Mfg.*, No. C 07-05452 WHA, 2008

1 WL 4712602, at *1 (N.D. Cal. Oct. 22, 2008). Defendants simply ignore it.

2 Finally, Defendants contend that the burdens of the COVID-19 epidemic fall only on their
3 shoulders, and should result in the case being delayed until their forthcoming motions to dismiss
4 are resolved. Opp’n, ECF 106 at 8-9. But this ignores the costs of delay to the class. The purpose
5 of this action is to put an end to a conspiracy whereby California consumers are forced to overpay
6 for bail bonds, and to put money into the hands of the hundreds of thousands of Californians who
7 have overpaid to get themselves or their loved ones out of jail. There has perhaps never been a
8 time when class members have needed this relief more than they do now.

9 The exorbitant prices of bail bonds, due in large part to the conspiracy Plaintiffs challenge,
10 are often out of reach of incarcerated Californians, resulting in more time spent in jail. “People
11 incarcerated before trial often lose their housing and employment, and pretrial detention damages
12 family relationships.” Criminal Justice Reform Clinic, UCLA Sch. of Law, *The Devil in the*
13 *Details: Bail Bond Contracts in California* 2 (May 2017), available at
14 https://static.prisonpolicy.org/scans/UCLA_Devil%20in%20the_Details.pdf. “[T]he inability to
15 raise money for bail and lengthy pretrial detention separates caregivers from dependent family
16 members, including children, the elderly, and disabled people, leaving them to suffer.” *Id.*
17 “While in jail, individuals are exposed to diseases and infections that can cause both short and
18 long-term medical conditions and that can be transmitted from the jail setting to families and
19 communities.” *Id.* at 3. As of this morning, there have been 1,216 confirmed cases of COVID-19
20 among prisoners in California and 9 confirmed deaths. See The Marshall Project, *A State-by-*
21 *State Look at Coronavirus in Prisons* (June 3, 2020), available at
22 <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

23 The epidemic also profoundly impacts prisoners after they leave custody. “Those leaving
24 custody enter a vastly different world in which a collapsed economy, scant job opportunities and
25 the closure of many government offices have compounded the challenges of getting lives back on
26 track.” Matt Hamilton et al., *California’s Prisons and Jails Have Emptied Thousands into a*
27 *World Changed by Coronavirus*, LA Times (May 17, 2020), available at
28 <https://www.latimes.com/california/story/2020-05-17/coronavirus-prison-jail-releases>.

1 Members of the proposed class are disproportionately low-income and people of color.
2 For instance, black class members were assigned higher bail amounts, and thus paid higher bail
3 bond prices. “Bail amounts assigned to black men average 35% higher than those for White men,
4 even when controlling for the seriousness of the offense.” *Devil in the Details*, *supra* at 3. These
5 individuals have suffered the most under the COVID-19 epidemic. *See, e.g.*, Emma Gray Ellis,
6 *COVID-19 is Killing Black People Unequally—Don’t be Surprised*, WIRED (May 2, 2020),
7 available at <https://www.wired.com/story/covid-19-coronavirus-racial-disparities/>; Jason DeParle,
8 *The Coronavirus Class Divide: Space and Privacy*, NY Times (Apr. 12, 2020), available at
9 <https://www.nytimes.com/2020/04/12/us/politics/coronavirus-poverty-privacy.html>. The
10 pandemic has brought the public health dangers associated with unaffordable bail bonds into
11 sharp focus. Further, supra-competitive bail bond prices not only keep people in detention longer
12 than necessary, but have also contributed to community grievances with our criminal justice
13 system, as highlighted by state- and nationwide protests in recent days. *See, e.g.*, Jill Cowan,
14 *From Sacramento to San Diego, Californians Join Protests*, NY Times (June 1, 2020), available
15 at <https://www.nytimes.com/2020/06/01/us/california-george-floyd-protests.html>.

16 Plaintiffs acknowledge the many challenges facing the parties and the Courts, and are
17 tremendously grateful that the Northern District of California has risen to the task. As Judge
18 Gonzalez Rogers recently put it: “we’re trying to keep things moving in this district. . . . We’re
19 not going to shut the courts down. We’re not going to shut down access. So we’ll keep moving
20 as best we can.” Tr. of Zoom Webinar Proceedings, *In re Lithium Ion Batteries Antitrust Litig.*,
21 No. C 13-MD-2420 YGR (May 20, 2020), at 50-51 (attached hereto as Harvey Decl. Ex. A).
22 Plaintiffs, too, are ready to proceed as best they can.¹

23
24 ¹ Defendants contend that Plaintiffs’ motion is procedurally improper, ECF No. 106 at 2, despite
25 the fact that they agreed to these briefs, ECF No. 101 at 4, and the Court then issued an order
26 directing that they be filed, ECF No. 104 at 1. Further, Defendants took the same approach as
27 Plaintiffs when they filed their motion to stay discovery. ECF No. 59. The same Paragraph J to
28 which Defendants cite was then Paragraph H. It was irrelevant then for the same reason it is now:
this is not a “discovery dispute”—discovery has not yet begun. To be sure, Plaintiffs preferred an
expedited procedure to the three weeks required to file these briefs. When Plaintiffs asked
Defendants to file a brief joint statement on this issue, they refused, requiring separate briefs on
even the schedule and page limits for these briefs. ECF No. 100-1 at 2-4.

1 Dated: June 3, 2020

Respectfully submitted,

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DATED: June 3, 2020

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